



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

YALE LAW JOURNAL

VOL. XVII

DECEMBER, 1907

No. 2

PELATIAH WEBSTER

THE ARCHITECT OF OUR FEDERAL CONSTITUTION

During the present session of Congress, a memorial will be presented whose purpose is twofold: first, to place in the hands of Congress the data for a new and pivotal chapter in the history of the constitution that will impress upon succeeding generations the all-important fact that every basic principle which differentiates our existing federal system from all that have preceded it was a part of a single invention struck off at a given time by the brain of one man; second, to press upon Congress the long, neglected duty of honoring, by an appropriate monument, the memory of an American statesman and patriot who has made a larger personal contribution to the science of government than any other one individual in the history of mankind. From the data thus to be presented it will clearly appear that among our nation-builders, Pelatiah Webster stands second to Washington alone. All the world understands in a vague and general way that certain path-breaking principles entered into the structure of our second Federal Constitution of 1789, which differentiate it from all other systems of federal government that have preceded it. M. de Tocqueville gave formal expression to that understanding when he said: "*This constitution, which may at first be confounded with federal constitutions that have preceded it, rests in truth upon a wholly novel theory which may be considered a great discovery in modern political science.*" In the confederations that preceded the American Constitution of 1789, the allied states, for a common object, agreed to obey the injunctions of a federal government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American states, which combined in 1789, agreed that the

federal government should not only dictate, but should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this difference produced the most momentous consequences.¹ Mr. Gladstone simply reiterated that idea when he said: "As the British constitution is the most subtle organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." That master of the history of English institutions perfectly understood that as our state constitutions are mere reproductions, mere evolutions from the English political system, so our second federal constitution is a new invention "struck off at a given time by the brain and purpose of man." That invention of a new type of federal government, embodying, as Tocqueville said, "a wholly novel theory," is so unique that it can no more be confounded with any preceding federal government than a modern mogul engine can be confounded with an ancient stage coach. Did that wonderful invention, which has produced such momentous consequences, have a personal author, like all other inventions; or was it revealed at the same moment, and in some mysterious way, to a large number of persons, thinking and acting in isolation? Upon that humanly impossible or miraculous theory, historians of our existing constitutions have attempted to explain the origin of the unique plan of federal government presented to the Convention which sat at Philadelphia during the 117 days that intervened between May 14 and September 17, 1787. After deducting recesses and holidays there could not have been more than 80 working days. No one has ever contended, or can ever contend, that the great invention in question was made *after the Convention met*, for the simple and conclusive reason that it was the basis of all the "plans" save one, carefully constructed beforehand, out of which the constitution was evolved. Five and only five "plans," all pre-constructed, were submitted to the Convention, viz.: the Virginia plan, the Charles Pinckney plan, the Connecticut plan, the Alexander Hamilton plan, and the New Jersey plan. As the last only proposed a revision of the Articles of Confederation it may be dismissed from consideration. There were but four plans in which proposals for a new system of federal government were embodied, each resting upon the "wholly novel theory" which has produced "the most momentous consequences." A distinguished specialist has well

1. Democracy in America, Vol. 1, pp. 198-199.

said that "the Virginia plan became the bed-rock of the constitution."² That plan, which embodied perfectly every phase of the great invention, was drafted by Madison who began his preparation for the labors of the Convention at least a year before it met.³ In December, 1786, we find him in active correspondence with Jefferson, then at Paris, as to the Virginia plan.⁴ The marvel is that the historians who are supposed to have explored the sources have never taken the pains to ask this simple and inevitable question: *From what common source did the draftsmen of the four plans draw the path-breaking invention which was the foundation of all of them?* Let it be said to the honor of those draftsmen that no one of them ever claimed to be the author of that invention. Neither Madison, nor Charles Pinckney, nor Sherman, nor Ellsworth, nor Hamilton, nor any of their biographers, so far as the writer is informed, ever set up such a claim in behalf of any one of them. The answer to "the simple and inevitable question" just propounded is this: The common source from which the draftsmen of the four plans drew the path-breaking invention underlying them all was "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," published at Philadelphia by Pelatiah Webster, February 16, 1783, and there republished by him with copious notes in 1791. In that immortal paper, whose lightest words are weighty, he gave to the world, as his personal contribution to the science of government, and as an entirety worked out in great detail, the "wholly novel theory" of federal government upon which reposes the existing constitution of the United States.

Prior to the date in question, no single element of that theory had ever been propounded by anyone. In a note appended to the republication of 1791, the great inventor gives the following account of the circumstances under which the invention was made: "At the time when this Dissertation was written (February 16, 1783) the defects and insufficiency of the Old Federal Constitution was universally felt and acknowledged, it was manifest, not only that the internal police, justice, security, and peace of the States could never be preserved under it, but the finances and

2. Meigs, *The Growth of the Const. in the Fed. Con. of 1787*, p. 17.

3. See Rives' *Life and Times of Madison*, Vol. ii, p. 208. "Preparations of Madison for Labors of Federal Convention."

4. See letter of Jefferson to Madison of Dec. 16, 1786, in *Jefferson's Correspondence*, by T. J. Randolph, Vol. ii, pp. 64-65.

public credit would necessarily become so embarrassed, precarious, and void of support that no public movement, which depended on the revenue, could be managed with any effectual certainty; but tho' the public mind was under full conviction of all these mischiefs, and was contemplating a remedy, yet the public ideas were not at all concentrated, much less arranged into any new system or form of government, which would obviate these evils. Under these circumstances I offered this Dissertation to the public, how far the principles of it were adopted or rejected in the New Constitution, which was four years afterwards (September 17, 1787) formed by the Convention, and since ratified by all the States, is obvious to every one." At the same time he added: "I was fully of opinion (tho' the sentiment at that time would not very well bear) that it would be ten times easier to form a new constitution than to mend the old one. I therefore sat myself down to sketch out the leading principles of that political constitution, which I thought necessary to the preservation and happiness of the United States of America, which are comprised in this Dissertation. I hope the reader will please to consider *that these are the original thoughts of a private individual*, dictated by the nature of the subject only, long before the important theme became the great object of discussion, in the most dignified and important assembly, which ever sat or decided in America." The great inventor perfectly understood the merits of his own case which he thus stated with the lucidity of a Greek and the terseness of a Roman. As early as 1781 Pelatiah Webster was the first to propose to the people of the United States, in one of his financial essays published at Philadelphia, the calling of "A Continental Convention" for the making of a new constitution. In bearing testimony to that fact Madison said that Pelatiah Webster, "after discussing the fiscal system of the United States, and suggesting, among other remedial provisions, one including a national bank, remarks that the authority of Congress is very inadequate to the performance of their duties; and this indicates the necessity of their calling a Continental Convention for the express purpose of ascertaining, defining, enlarging and limiting, the duties and powers of their constitution."⁵ Two years after he had thus sounded the tocsin for the States to assemble, he made the invention and published to the world, in detail, the plan upon which the constitution was to be formed.⁶ While the historian Bancroft failed to appreciate the

5. The Madison Papers (1841) Vol. ii., pp. 706-7.

6. It was replied to by Roger Sherman.

stupendous importance of his work, he frankly admits that he actually performed it when he says: "The public mind was ripening for a transition from a confederation to a real government. Just at this time Pelatiah Webster, a graduate of Yale college, in a dissertation published at Philadelphia, proposed for the legislature of the United States *a congress of two houses*, which should have ample authority for making laws 'of general necessity and utility,' and *enforcing them as well on individuals as on states*. He further suggested not only heads of executive departments, but judges of law and chancery. The tract awakened so much attention that it was reprinted in Hartford, and called forth a reply."⁷ Pelatiah Webster needs the admissions neither of Madison nor of Bancroft to establish his title to the authorship of the "wholly novel theory" now embodied in the constitution of the United States, because his title rests upon contemporary documentary evidence as clear and convincing as that upon which rests Jefferson's title to the authorship of the Declaration of Independence. If that be true, then he has made a larger personal contribution to the science of government than any other one individual in the history of mankind. Among our nation-builders he stands second to Washington alone. And yet among them all he only has been neglected and forgotten by his countrymen, not through any conscious omission, but because of a careless historical scholarship which has failed to present his great achievement in its true light. That conviction has impelled the undersigned, who have devoted more than thirty years to the special study of the origin and growth of our constitutional systems, state and federal, to present to Congress, very briefly, the historical date upon which Pelatiah Webster's right to immortality depends. He it was who first suggested the separate existence of the two houses of Congress when, in 1783, he said: "That the Congress shall consist of two chambers, an upper and a lower house, or senate and commons, with the concurrence of both necessary to every act; and that every State send one or more delegates to each house; this will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision." Prior to that utterance no federal assembly, ancient or modern, had ever consisted of two chambers; no one had ever suggested such an idea. If, after a careful examination of all the facts, the Congress shall deem the architect

of our federal constitution unworthy of a monument, it is hoped that the memorial presented in his behalf may be entered in its records so that succeeding generations may determine for themselves whether or no his work has been justly judged.

I.

FEDERAL GOVERNMENTS PRIOR TO AND INCLUDING THAT OF 1776.

From the days of the Greek Leagues down to the making of the second constitution of the United States, all federal governments had been constructed on a single plan at once clumsy and inefficient. The most perfect of the Greek Leagues was the Achaian, of which the framers really knew nothing, as we learn from Madison who tells us in the *Federalist* (xviii) that: "Could the interior structure and regular operations of the Achaian Leagues be ascertained, it is probable that more light might be thrown by it on the science of federal government than by any like experiments with which we are acquainted." The coveted knowledge was not accessible because the historical scholars who have since passed beyond the Greece of Thucydides into the Greece of Polybios, who have passed beyond the period in which the independent city-commonwealth was the dominant political idea into the later and less brilliant period of Hellenic freedom occupied by the history of Greek federalism, had not then completed their investigations, only fully worked out in very recent years. Such scanty knowledge as the framers did possess of Greek federalism seems to have been drawn from the little work of the Abbé deMably, *Observations sur l'Histoire de la Grèce* (*Federalist* xviii). The only federal governments with whose internal organizations the builders of our federal republic were really familiar, and whose histories had any practical effect upon their work, were those that had grown up between the Low-Dutch communities at the mouth of the Rhine and between the High-Dutch communities in the mountains of Switzerland, and upon the plains of Germany (*Federalist* xix, xx). Down to the making of the second constitution of the United States, the Confederation of Swiss Cantons, the United Provinces of the Netherlands, and the German Confederation really represented the total advance made by the modern world in the structure of federal governments. Such advance was embodied in the idea of a federal system made up of a union of states, cities or districts, representatives from which composed a single federal assembly whose limited powers could be brought to bear not upon individual

citizens but only upon cities or states as such. The fundamental principle upon which all such fabrics rested was the requisition system, under which the federal assembly was only endowed with the power to make requisitions for men and money upon the states or cities composing the league for federal purposes, while the states, alone, in their corporal capacity possessed the power to execute them. The initial effort of the English colonies in America along the path of federal union ended with the making of the first constitution of the United States embodied in the Articles of Confederation. Up to that point nothing new had been achieved; the fruit of the first effort was simply a confederation, constructed upon a plan over two thousand years old, which could only deal through the requisition system with states as states. The confederation possessed no power (1) to operate directly upon the individual citizen; (2) it had no independent power of taxation; (3) the federal head was not divided into three departments: executive, legislative and judicial; (4) the federal assembly consisted of one chamber instead of two. The lack of power to levy and collect for itself federal or national taxes rendered our first federal government preeminently a failure as a financial system dependent as it was upon the wills of thirteen independent legislatures.⁸

II.

PELATIAH WEBSTER'S INVENTION AND THE SECOND CONSTITUTION OF 1787.

The most scientific writer upon finance during the Revolutionary War was Pelatiah Webster whose essays upon that subject fill a volume.⁹ He was born at Lebanon, Connecticut, in 1725, and graduated at Yale College in 1746. In 1755 he removed to Philadelphia, where he became a prosperous merchant, and in due time an ardent supporter of the patriot cause in the War of the Revolution, aiding with pen and purse. He was captured by the British, and, on account of his ardor was imprisoned for four months. As early as October, 1776, he began to write on the currency, and in 1779 he commenced the publication in Philadelphia of a series of "Essays on Free Trade and Finance." He was sufficiently important as a political economist to be consulted by the Continental Congress as to the resources of the country.

8. See Pelatiah Webster's masterful analysis of the Articles of Confederation contained in his Notes published in 1791.

9. The second edition of 1791 was "Printed and sold by Joseph Cruikshank, No. 91 High Street," Philadelphia.

His financial studies soon convinced him that no stable fiscal system could be established until the then existing federal government was wiped out and superseded by one endowed with independent taxing power. Therefore, as early as 1781, in one of his financial essays, he made the first public call for the "Continental Convention," referred to by Madison, to be armed with power to devise an adequate system of federal government. Having thus taken the first step, he set himself to work to formulate in advance such an adequate system as the Convention should adopt, whenever it might meet.

In the great tract published at Philadelphia, February 16, 1783, we have photographed for us the workings of his mind as he moved along paths never trod before. He sounded the keynote when he declared: "They (the supreme power) must therefore of necessity be vested with a power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury, when ill used; yet, from the necessity of the case it must be admitted. For to give a supreme authority a power of making contracts, without any power of payment; of appointing officers, civil and military without money to pay them; a power to build ships, without any money to do it with; a power of emitting money, without any power to redeem it or of borrowing money without any power to make payment, etc.; such solecisms in government are so nugatory and absurd, that I really think to offer further argument on the subject would be to insult the understanding of my readers. To make all these payments dependent on the votes of thirteen popular assemblies, who will undertake to judge of the propriety of every contract and every occasion of money, and grant or withhold supplies according to their opinion, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd." Thus Pelatiah Webster proposed the existing system of federal taxation, then entirely new, to the world; thus he proposed that the ancient system of requisitions, resting on the taxing power of the states, should be superseded by a federal or national taxation extending to every citizen, directly or indirectly. Instead of the lifeless system of absurdity embodied in the Articles of Confederation, he proposed to substitute a self-executing and self-sustaining national system, based on the following propositions, stated in his own language: "The supreme authority of any state must have power enough to effect the ends of its appointment, otherwise these ends cannot be answered and

effectually secured. . . . I begin with my first and great principle, viz.: that the constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme authority must have the power of making war and peace; of appointing armies and navies; of appointing officers both civil and military; of making contracts; of emitting, coining and borrowing money; of regulating trade; of making treaties with foreign powers; of establishing post-offices; and in short of doing everything which the well-being of the Commonwealth may require, and which is not compatible to any particular State, all of which require money, and cannot possibly be made effectual without it. . . . This tax can be laid by the supreme authority much more conveniently than by the particular Assemblies, and would in no case be subject to their repeals or modifications; and of course the public credit would never be dependent on, or liable to bankruptcy by the humors of any particular assembly. . . . The delegates which are to form that august body, which are to hold and exercise the supreme authority, ought to be appointed by the States in any manner they please."

In formulating his conclusions as to the supremacy of federal law acting directly on all citizens, he said: "1. No laws of any State whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject; this is too plain to need proof. 2. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence) which fail of execution are much worse than none; they weaken the government; expose it to contempt. . . . A government which is but half executed, or whose operations may all be stopped by a single vote, is the most dangerous of all institutions. . . . Further I propose that if the execution of any act or ordinance of the supreme authority shall be opposed by force in any of the States (which God forbid!) it shall be lawful for Congress to send into such a State a sufficient force to suppress it. On the whole, I take it that the very existence and use of our Union effectually depends on the full energy and final effect of the laws made to support it; and therefore I sacrifice all other considerations to this energy and effect and if our Union is not worth this purchase we must give it up; the nature of the thing does not admit any other alternative."

In these ringing terms was announced the path-breaking invention of a supreme and self-executing federal government operating directly upon the citizen; an invention for which the

world had been waiting for two thousand years; *an invention of which no trace nor hint is to be found in the constitutions of any of the Teutonic Leagues, in the Articles of the Confederation, nor in the prior utterances of any other man.*

Having thus defined his fundamental concept of a federal government operating directly on the citizen, the great one boldly accepted the inevitable corollary that such a government must be strictly organized and equipped with machinery adequate to its ends; with the usual branches, executive, legislative and judicial; with its army, its navy, its civil service, and all the usual apparatus of a government, all operating directly upon every citizen of the Union without any reference to the government of the several States. No such federal government, ancient or modern, had ever existed. As Montesquieu was the first to point out the division of State powers into executive, legislative and judicial, originated in that single State in Britain we call England.¹⁰ From that single State the principle passed into the single States of the American Union.¹¹ Pelatiah Webster was the first to conceive of the application of the principle of the division of powers to a *federal State*; he was the first to propose that *the federal head* should be divided and then organized as the particular ones are into legislative, executive and judicial. More than three years later, Jefferson endorsed that idea by commending it to Madison.¹² Having thus made his second great invention, Webster proceeded to explain how the three departments, executive, legislative and judicial, should be organized. His idea was that the executive power should be vested in a council of ministers to be grouped around a President elected by Congress. On that subject he said: "These ministers will of course have the best information, and most perfect knowledge of the state of the Nation,¹³ as far as it relates to their several departments, and will of course be able to give the best information to Congress, in what manner any bill proposed will affect the public interest in their several departments, which will nearly comprehend the whole. The Financier manages the whole subject of the revenues and expenditures; the Secretary of State takes knowledge of the general policy and internal government; the Minister of War presides in the whole business

10. Spirit of Laws, bk. XI, ch. 6.

11. Federalist, XLVI.

12. In the letter written from Paris, December 16, 1786, heretofore cited.

13. The creator of the national spirit spoke of the Nation and spelled it with a capital N.

of war and defence; and the Minister of Foreign Affairs regards the whole state of the Nation, as it stands related to, or connected with, all foreign powers. . . . I would further propose that the aforesaid great Ministers of State shall compose a Council of State to whose numbers Congress may add three others, viz.: one from New England, one from the Middle States and one from the Southern States, one of which to be appointed President by Congress."

To the organization of the legislative department Webster gave elaborate consideration. Just as no prior *federal government* had ever been divided into three departments, so no prior *federal legislature* had been divided into two houses. The one-chamber body represented by the Continental Congress was the type of every other federal assembly that had ever preceded it. As stated heretofore the path-breaker, looking to the English bicameral system as it had reappeared in the several states, proposed "That the Congress shall consist of two chambers, an upper and lower house or senate and commons, with the concurrence of both necessary to every act; and that every State send one or more delegates to each house; this will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision." Citizens of the United States, to whom such a division now seems a matter of course, should remember that when Webster proposed it, it was an unprecedented novelty in the history of the world, so far as federal legislatures are concerned. After an elaborate discussion of the qualifications of members of Congress, in which he sharply assailed the then existing rule forbidding their reelection, he proceeded to define a *part* of the original jurisdiction of the Supreme Court of the United States by saying "that the supreme authority should be vested with powers to terminate and finally decide controversies arising between different States." He also said "To these I should add judge of law and chancery."

Thus the entire federal judicial system was distinctly outlined. Above all, he was careful to define the reserved powers of the States. On that subject he said: "I propose further, that the powers of Congress, and all the other departments acting under them, shall be restricted to such matters only of general necessity and utility to all the States as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent; so that each particular

State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general union." In that passage we have the first draft, and a very complete one, of the Tenth Amendment. Thus it is a matter of documentary evidence that every element that entered into the "wholly novel theory which may be considered a great discovery in modern political science," and which differentiates our second federal constitution of 1789 from every other that preceded it, was the deliberate invention of Pelatiah Webster who announced to the world that theory, *as an entirety*, in his epoch-making paper of February 16, 1783. Prior to that date no federal government had ever existed (1) that operated directly on the individual citizen; (2) no federal government had ever been divided into three departments, executive, legislative, and judicial; (3) no federal legislature had ever been divided into an upper and lower house. There is no record, there is not even a claim that, *prior to that date*, any human being had ever propounded any one of those principles in connection with a federal government. The great inventor was so conscious at the time of the magnitude of his undertaking, that he exclaimed as he wrote; "May almighty wisdom direct my pen in this arduous discussion."

In conclusion he said; "This vast subject lies with mighty weight on my mind, and I have bestowed on it my utmost attention, and here offer the public the best thoughts and sentiments I am master of. I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect, if my dissertation shall throw any light on the great subject, shall excite any emulation, and animate some abler genius to form a plan of greater perfection, less objectionable, and more useful." In his re-publication of 1791, he described perfectly the circumstances under which the great invention of February 16, 1783, was made, when he said that, "the public ideas were not at all concentrated, much less arranged into any new system or form of government, which would obviate these evils. Under the circumstances, I offered this Dissertation to the public." In that Dissertation, Pelatiah Webster presented, as a free gift to the great country that has forgotten him, the new system or form of government which passed, through the four "plans" offered in the Federal Con-

vention of 1787,¹⁴ into the existing constitution of the United States. Certainly no more "wonderful work was ever struck off at a given time by the brain and purpose of man." As an evidence of his highly practical temper the fact should be mentioned in conclusion that having been a successful merchant his pet hobby seems to have been to create a Department of Commerce in close touch with Congress. He said: "I therefore humbly propose, if the merchants in the several States are disposed to send delegates from their body to meet and attend the sittings of Congress, that they shall be permitted to form a chamber of commerce, and their advice to Congress be demanded and admitted concerning all bills before Congress, *as far as the same may affect the trade of the States.*"

In his criticisms made in 1791 of the work of the Federal Convention he said that its failure to accept that suggestion was a great mistake. The very recent creation of a Department of Commerce and Labor has at last effectuated his idea. Only through the vista of receding years can such an epoch-making mind be viewed in all its grandeur. What signifies a century of neglect passed in the midst of the "momentous consequences" his work was wrought! His time is at hand; his fame is as safe and as certain as the immortality of thought and the unerring justice of the tribunal of history. His abiding faith in the justice of that tribunal he clearly expressed when he said: "But if any of these questions should in future time become objects of discussion, neither the vast dignity of the Convention, nor the low unnoticed state of myself, will be at all considered in the debates; the merits of the matter, and the interests connected with or arising out of it, will alone dictate the decision." The humanly impossible and miraculous theory which has heretofore serenely assumed that the greatest and most unique of all political inventions had no inventor, cannot survive a method of historical investigation that undertakes to demonstrate that beneath every shell there is an animal, behind every document there is a man.

Hannis Taylor.

14. At a later time a grave controversy arose as to "the *singularly minute coincides* between the draught of the Federal government communicated by Mr. Charles Pinckney of South Carolina, to Mr. Adams, Secretary of States," the Virginia plan, and the constitution as finally adopted. Every explanation of the "singularly minute coincides" was given but the plain and obvious one—*all four plans were alike because they were taken from a common source.* See Rives' Life and Times of Madison, vol. ii. pp. 353-357.